PUBLIC PROSECUTOR

v.

GURCHAN SINGH MALL SINGH

HIGH COURT MALAYA, KUALA LUMPUR
MOHTAR ABDULLAH JC
[FT CRIMINAL TRIAL NO. 58-25-87]
16 MARCH 1990

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Insufficient evidence to prove trafficking - Negotiations for sale of the recovered drugs - Explained identification of accused as target - Evidence of prosecution witnesses "too neat" - Conviction on lesser charge of possession.*

The accused was charged with trafficking in a dangerous drug under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act").

The prosecution's evidence showed that after receipt of information by an inspector (PW2), he and a police party went to the scene. There, PW2 gave instructions to 3 constables (PWs 4, 5 & a third person) to pose as "buyers"; no informer or anyone else was around at the scene to help identify or point out the accused to the police party. None had ever seen the accused before that day. The 2 PCs went straight to the "modern singh" (the accused) and immediately entered into conversation/negotiation to purchase "barang". The accused without any hesitation agreed to sell the "barang" and went away to the back of a sawmill and came back a few minutes later with something in his hand whereupon PW5 immediately arrested the accused and seized from the accused 3 plastic bags containing the offending heroin.

PW5 also tendered a written record of the negotiations with the accused (P10) which was allegedly written by PW5 on the same day that the accused was arrested.

Observations on charge framed by prosecution in light of the small amount of heroin found.

Held:

[1] The Court did not find PWs 2, 4 and 5 to be credible witnesses. The testimony given by them were too neat. PWs 4 & 5 amazingly could recall in nearly identical words the contents of P10 and other bits of conversation not noted in P10. Further, PW5 was able to recall the conversation between PW4 and the accused in nearly identical words when PW4 confessed that they were not the same. The irresistible inference is that there seems to be substantial "editing" and embellishment" in the testimonies of both PWs 4 and 5 as regards the alleged negotiation.

[2] PW2's testimony is too simple and superficial and does not throw much light on this vital issue of negotiation as alleged in the charge. The only evidence worth believing is that of the investigating officer (the IO).

[3] The prosecution has not given any evidence as to how they identified the accused as "the target" and "zoomed" in on him. The only description was that "the target" was "a modern Singh".

[4] A vital question at the end of the defence's case is whether the accused's story is reasonable or probable, especially as regard the presence of a well-known drug pusher at the time of the offence.

[5] At the end of the defence's case the Court concluded that although the accused's story is not to be entirely believed a reasonable doubt has been cast as to what really was the so-called negotiation between PW4 and the accused.

[6] The recovery of the 3 plastic packets was properly proved but there is a nagging doubt as to the truth of the prosecution's case relating to the negotiation for the purpose of trafficking in heroin. The accused is entitled to the benefit of this doubt.

[7] The Court is however satisfied that the packets were found on the accused and the accused in the circumstances had knowledge of the heroin contained in the packets. The accused was without a doubt in possession of the said drugs and has thus committed an offence under s. 12(2) of the Act.

[Accused acquitted and discharged of the charge under s. 39B but convicted under s. 12(2) of the Dangerous Drugs Act and sentenced to 5 years imprisonment with effect from the date of arrest.]

Legislation referred to:
Criminal Procedure Code, s. 180
Dangerous Drugs Act 1952, ss. 12(2), (3), 39A(1), 39B, 39B(1)(c), 40

For the public prosecutor - Farah Suhana, DPP
For the accused - C. Sequerah and Karpal Singh

JUDGMENT

Mohtar Abdullah JC:

Before I deliver my findings and decision, let me say a few words on the prosecution of this case.

At the close of the prosecution's case, I had commented on the seriousness of the prosecution in pursuing this charge for the capital offence under s. 39B for such a small amount of drug of heroin. If not for this trafficking charge this amount of heroin would on the date of the alleged offence (24 October 1986) only attract a charge under s. 12(2) Dangerous Drugs Act for which, on conviction, the maximum punishment under s. 12(3) would only be a fine of RM20,000 or imprisonment not exceeding 5 years or to both.

After 1 January 1987, *vide* the Dangerous Drug (Amendment) Act A659, this amount (2 grammes or more but less than 5 grammes of heroin) would attract an increased penalty under s. 39A(1) i.e., imprisonment for a term not less than two years but not exceeding 5 years and also whipping of not less than 3 strokes but not more than 9 strokes.

Although the Court cannot question the legal right of the public prosecutor to charge the accused for trafficking under s. 39B for trafficking in the small amount of heroin (i.e., 2.29 grammes), this Court cannot help but wonder why this accused is charged for trafficking in this small amount when there are, to the Court's knowledge, hundreds of cases where, as a rule and practice, the prosecution fairly prosecuted under s. 39A or even s. 12(2), depending on the amount of dangerous drug and the date of the commission of the offence (i.e., whether before or after the amendment in 1987). In fact, just only last week in a drug trafficking case before this Court in respect of 13.99 grammes of heroin, the prosecution wisely elected to amend the charge and proceeded under s. 39A. But in the present case the prosecution has, in its' wisdom, considered it necessary to pursue the drug trafficking charge until the very end. But that is the legal right and prerogative of the prosecution. And as I had said before, the

Court cannot question the prerogative of the public prosecutor (acting through the principal officers of the prosecution division). This Court is compelled to do its duty according to the law - and, if the evidence so warrant, the Court has no alternative but to convict the accused under s. 39B and sentence him to death for such a small amount of heroin. I think the salutary effect of this particular prosecution of this case, whatever its outcome, is the warning by the senior officers of the public prosecutor's chambers to all drug peddlars in our streets that even if they sell or traffic in, for example, 1 packet containing 0.01 gram of heroin or 1 straw of ganja they are liable under the law to the extreme penalty of death on prosecution and conviction under s. 39B of the Dangerous Drugs Act! In the eyes of the law a big time drug trafficker or a small time street pusher runs the same risk of the death for trafficking.

However, as I said earlier in this trial, there is a general pattern or principle running through the Dangerous Drugs Act of different grades of offences meriting different degrees of punishment, with the death penalty being normally reserved for the most serious case of trafficking in substantial quantity of dangerous drugs. There seems to be sound rationale and reasonable classification for the various types or grades of offences under the act which merits different degrees punishment and treatment. Though our drug laws may appear to be harsh, they are really very reasonable and fair. And fairness is one great quality we, as officers of the Courts, should never loss sight of - whether we be Judges, prosecutors or defence Counsels.

I have considered the evidence adduced by the prosecution, and despite whatever misgivings I might, consciously or unconsciously, have about the propriety of this particular prosecution in our present case, I have, as is my bounden duty, acted strictly according to the law and the evidence before me. Consequently, on the evidence before me and in accordance with s. 180 of the Criminal Procedure Code, and relying on the principles enunciated in *Haw Tua Tau, Ragunathan, Munusamy*, etc., I found, at the close of the prosecution's case, that the prosecution has proved a *prima facie* case against the accused which, if unrebutted, would warrant his conviction. I had accordingly called upon the accused to enter his defence. However, I have kept an open mind on question of fact as to the actual guilt of the accused until the close of the defence case.

I have now considered the defence story and tested it against all the evidence adduced by the prosecution, I have considered all the evidence adduced by both the prosecution and the defence, and at the end of the whole case, having kept an open mind on the credibility of witnesses and other questions of fact, it is now my duty to decide on the ultimate decision, i.e., whether on the evidence as a whole, the prosecution has proved to the satisfaction of the Court, as a tribunal of facts, that the accused is guilty as charged.

There are several findings I have made leading to this ultimate decision and I shall deal with those findings in detail in my written judgment later. Today, I would only like to comment on the credibility of prosecution witnesses as regards the central issue of negotiation for the sale of heroin by the accused to the 3 Detective Police Constables.

Straight to the point - I do not find Inspector Giam (PW2), DPC Ravinthiran (PW4) and DPC Tahat (PW5) to be credible witnesses. I find their testimonies "too neat" - PW2 received an information; he went to the scene with his police party (including PW4, PW5 and Detective Police Constable Bala); at the scene he gave instruction to PW4, PW5 and DPC Bala to pose as buyers; no informer or anyone else was around at the scene to help identify or point out the accused to the Police party - none of whom had ever seen the accused before that day; the 3 DPCs went straight to this "modern Singh" (the accused) and immediately

entered into conversion/negotiation to purchase "barang", the accused without any hesitation agreed to sell the "barang", went away to back of the sawmill and come back a few minutes later with something in his hand, whereupon he was immediately arrested by PW5 who seized, from the accused's right hand, 3 plastic packets containing the offending heroin.

On an indepth perusal of PW4 and PW5's testimonies (as to the negotiation and the recording of that so-called negotiation in P10) I find that, nearly 3½ years after the incident, both PW4 and PW5 were not only able to recollect in nearly identical words the content of P10 but, more amazing still, were able to exactly remember the extra bits of conversion, which were not recorded in P10, in nearly identical words.

PW4 admitted, in cross-examination, that his recollection of the conversation were not the exact words he spoke to the accused. What makes this admission most significant is the fact that PW5, who allegedly heard PW4 and the accused speaking, was able to exactly recollect in nearly identical terms the words used by PW4 which PW4 himself had confessed were not the exact words he used. The inference is irresistible that there seems to be substantial "editing" and "embellishment" in the testimonies of both PW4 and PW5 as regards the alleged negotiation.

If P10 was indeed a record of the negotiation written down by PW5 on 1.30 p.m. on the same day the accused was arrested, why was it not handed over to the IO (Inspector Raja Khalid) the same evening when Inspector Giam handed over the accused and the drugs to the said IO?

The testimony of Inspector Giam (PW2) is too simple, too superficial - much have not been said by him! He never mentioned about directing the 3 DPCs to record the negotiation/ conversation (which both PW4 and PW5 said he did direct); he never mentioned anything about handing over P10 to the IO (which the IO said was handed on 29 October 1986); he never mentioned about giving any money to the 3 DPCs to buy drug (which PW4 said was RM80 each but which PW5 said was RM70; he never mentioned about preparing a search list: in fact no search list was tendered by the prosecution though the IO candidly admitted "Ada search list dalam fail penyisatan". In short, Inspector Giam's testimony does not throw much light on this vital issue of negotiation, the act as alleged in the charge.

In the circumstances, I find that the only Police Officer who is worthy of belief is the IO, Inspector Raja Khalid - a straight forward and candid witness when compared to those 3 witnesses (PW2, PW4 and PW5). As I said earlier the IO candidly admitted there's a search list in the IP - though the prosecution elected not to produce it but make lengthy submission on the absence of any legal requirement to made a search list in the circumstances of this case. He candidly admitted receiving P10 from Inspector Giam (though PW5 claimed that he handed P10 to the IO personally). I am inclined to believe the IO rather than PW5 on this issue. The IO candidly confirmed that as a result of his investigation, he was satisfied that Inspector Giam and the 3 DPCs had never seen the accused before the day in question (24 October 1986 - the date of arrest).

This brings us right to square one! How could Inspector Giam and the 3 DPCs have identified or recognize the accused as the "target" when they had never seen him before and when no one, not even the so-called informer, was there to help Inspector Giam to identify the target and zoom in on him! The only description given in Court as to the target is a "modern Singh". Even if Mr. Karpal Singh were to pass that sawmill at that fateful hour he would surely have fitted that "fantastic" description! Also, is it possible that a drug pusher would sell his illicit drug to total strangers, without any introducer or intermediary? Unless, of course, the buyer

is obviously a drug addict and, in the circumstances, the pusher will have no qualm about selling to such drug addict! PW5 had said that the accused was suspicious of "bonds" (meaning police officers) in the area. With such suspicion, would the accused had dealt with these three strangers who obviously did not look like drug addicts! In my experience on the bench and in the Attorney-General's chambers (especially in the prosecution division) a trap case or a "buy op" of this kind would normally involve an informer who not only give the initial information but would also assist in introducing the so-called "buyers" to the suspect-seller, and who would sometime take part in the negotiation (in which case he become an agent provocateur) or who would normally be present at or around the scene of the transaction. If such an informer is used by the Police, then s. 40 of the Dangerous Drugs Act would protect against the disclosure of the informer's identity. Generally Police Officers would be quite reluctant to reveal the presence of their informers, despite the protection accorded by s. 40 of the Act. I have come across a couple of cases when Police Officers take the convenient and easiest way out of their dilemma by not revealing the presence of such an informer or "source" (to use the police lingo) even to the their own IOs, much less to the Deputy Public Prosecutors! Is the present case possibly an example of such misguided zeal to protect confidential "sources" from the prying eyes of the Court?

It is an integral part of the defence case that one drug pusher named Ravi was present at the scene. He was a person who had been pushing drugs to the accused, sometimes free of charge, as he was a good friend of the accused. According to the defence, he was the "Indian man" who had come with the 3 Detective Police Constables to the sawmill and entrapped the accused. The vital question, at the end of the defence case, is whether the accused's story is reasonable or probable, specially as regards the presence of this person Ravi at the scene at the time of the offence. Does he exist or is he a mere figment of the accused's imagination? Though the learned Deputy Public Prosecutor has not specifically put it to the accused that Ravi was a non-entity, a figment of the accused's vivid imagination, it is nevertheless clear from the tenor of the prosecution's case that no other person (apart from the police personnel and the accused) was at the scene at the relevant time. PW4 and PW5 were most emphatic about this. As usual PW2 has nothing to say on the matter. But the IO did not totally discount the existence of this extra person on the scene. He honestly admitted that:

> Mereka bertindak di atas maklumat yang diterima. Saya tak tahu sama ada pemberi maklumat ada di tempat kejadian untuk membantu Inspektor Giam.

Could this Ravi possibly then be the informer or introducer? At the end of the defence case, I come to the conclusion that, though I do not entirely believe the accused story, a reasonable doubt is cast in my mind as to want really was the so-called negotiation between PW4 and the accused. In the light of the fact that the 3 packets containing heroin were recovered from the accused (which I find is properly proved), the negotiation for the "barang" (if the testimonies of PW4 and PW5 on the negotiation were to be believed) would clearly show that there was a negotiation for the purpose of selling heroin. But as I have said earlier, I find PW4 and PW5 to be witnesses quite difficult to be believed, though not totally unbelievable. Their near identical testimonies and the circumstances of the transaction between seller and buyers, hitherto unknown to each other, create some nagging doubt in my mind as to the truth of the prosecution's case relating to the negotiation for the purpose of trafficking in heroin. The accused is therefore entitled to the benefit of this doubt.

However, on the facts of this case I am satisfied that the 3 packets containing 2.29 grams of heroin were in fact found on the accused and that the accused, in the circumstances, had knowledge of the heroin contained in the said plastic packets. Without doubt the accused

was in possession of the said dangerous drug. However transient such possession was, an offence of possession of heroin contrary to s. 12(2) of the Act is clearly proved against the accused. As I said earlier, s. 39A is not applicable as, before 1 January 1987, the possession of 5 grammes or more of heroin would attract the increased penalty provided by that section as it then stood.

I therefore find the accused not guilty of the charge under s. 39B(1)(c) of the Dangerous Drugs Act. In accordance with s. 169 of the Criminal Procedure Code I find the accused guilty of the minor offence of possession of 2.29 grammes of heroin under s. 12(2) of Dangerous Drugs Act.

(Counsel addresses Court in mitigation on behalf of the accused).

I hereby convict the accused and sentence him to 5 years imprisonment (with effect from his date of arrest). All exhibits to Police for disposal.

As a footnote, it is fortunate for the accused that the Court had found him guilty of the minor offence under s. 12(2) of the Dangerous Drugs Act. If he had been found guilty under s. 39B(1)(c) this Court will have no alternative and no hesitation to sentence him to death. That is the law of the land. And as the Latin maxim says: "*Fiat Justitia Ruat Coelum,* Let Justice be done though the heavens should fall."

Fortunately for the accused, the sky has not fallen on his head now.

Also found at [1990] 2 CLJ 78